BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

FILED
11-20-07
04:59 PM

Rulemaking for Adoption of a General Order and Procedures to Implement the Digital Infrastructure and Video Competition Act of 2006.	R. 06-10-005 (Filed October 5, 2006)

RESPONSE OF THE DIVISION OF RATEPAYER ADVOCATES TO APPLICATIONS FOR REHEARING OF DECISION 07-10-013

Helen M. Mickiewicz
Attorney for the Division of Ratepayer Advocates
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102
Tel.: (415) 703-1319
Fax: (415) 703-4592
E-Mail: hmm@cpuc.ca.gov

Robert Lehman
Public Utilities Regulatory Analyst
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102
Tel: (415) 703-2245
Email: leh@cpuc.ca.gov

November 20, 2007

I. INTRODUCTION

Pursuant to Article 16 of the Commission's Rules of Practice and Procedure, the Division of Ratepayer Advocates (DRA) hereby responds to the Applications for Rehearing of Decision 07-10-013 filed by Pacific Bell Telephone Company *dba* AT&T California (AT&T) and Verizon California, Inc. (Verizon). In their Applications for Rehearing, AT&T and Verizon seek to overturn an annual reporting requirement imposed on all statewide video franchise holders; namely, to report the number of video subscribers by census tract. The Commission established this reporting requirement as part of its implementation of the Digital Infrastructure Video Competition Act of 2006 (DIVCA).[1]

In challenging this reporting requirement, AT&T and Verizon misconstrue the statutory language of DIVCA. In addition, AT&T and Verizon's Applications for Rehearing amount to a collateral attack on an earlier Commission decision involving the implementation of DIVCA – Decision 07-03-014. Contrary to the utilities' assertions, the Commission does have authority to require statewide franchise holders to provide information concerning the number of video subscribers by census tract. This information is necessary for the Commission to assess whether statewide video franchise holders are engaging in discrimination or providing access to their networks as contemplated by DIVCA. For these reasons, the Commission should deny AT&T and Verizon's Applications for Rehearing.

II. DIVCA DOES NOT PROHIBIT THE COMMISSION FROM REQUIRING HOLDERS OF STATEWIDE VIDEO FRANCHISES TO REPORT VIDEO SUBSCRIBER INFORMATION BY CENSUS TRACT

AT&T and Verizon claim that DIVCA prohibits the Commission from imposing a reporting requirement on all statewide video franchise holders to report the number of

[1] California Public Utilities Code § 5800 *et seq*.; Decision 07-10-013.

video subscribers by census tract.[2] This claim falls short. There is no language in DIVCA that expressly limits the Commission's authority to obtain information from a statewide video franchise holder. AT&T and Verizon rest their argument largely on selective text from § 5840(a) of the California Public Utilities Code. The full text of § 5840(a) is as follows, with the language selectively quoted by AT&T and Verizon underlined:

> The commission is the sole franchising authority for a state franchise to provide video service under this division. Neither the commission nor any local franchising entity or other local entity of the state may require the holder of a state franchise to obtain a separate franchise or otherwise impose any requirement on any holder of a state franchise except as expressly provided in this division. Sections 53066, 53066.01, 53066.2, and 53066.3 of the Government Code shall not apply to holders of a state franchise.

Section 5840(a) addresses the Commission's role in issuing state franchises. The above-quoted language when read in its entirety addresses the exclusive authority of the Commission to issue state franchises as authorized by DIVCA. It does not limit the Commission's authority to obtain information to enforce the terms of DIVCA itself. The Government Code sections referred to in the last sentence above address city and county cable television franchising requirements that might potentially conflict with the issuance of a state franchise under DIVCA. Here, the point is that in order to operate a statewide video franchise, the holder only need obtain a franchise from the Commission. By lifting the underlined language out of its context, AT&T and Verizon have misconstrued the Commission's authority.

AT&T further inflates the foundation for its argument by claiming that §§ 5920 and 5960 of the California Public Utilities Code set forth the exclusive reporting requirements of DIVCA.[3] While §§ 5920 and 5960(b) explicitly require annual reporting

[2] AT&T Application for Rehearing at p. 1; Verizon Application for Rehearing at p. 3.

[3] AT&T Application for Rehearing at p. 1.

by every statewide video franchise holder, these provisions do not prohibit the reporting of additional information required by the Commission. Other provisions of DIVCA implicitly require that the Commission collect video subscriber data. For example, § 5890(e) of the California Public Utilities Code provides for franchise holders to show to the Commission that they are deploying facilities as contemplated by DIVCA based on video subscriber information.[4]

AT&T makes much of the Legislative History of DIVCA, which included a version of the bill that required reporting of video subscribers by census tract.[5] AT&T argues that this language was not included in DIVCA and therefore should be read as an expression of legislative intent that such data not be collected by the Commission. To the contrary, the proposed legislative language AT&T references addressed a requirement that the Commission should report video subscriber data periodically to the Governor and Legislature, as well as have the data "posted on the [video franchise] holder's Internet site."[6] These provisions would essentially have made such data public. It is far more rational to conclude that the Legislature intended to protect such information from public disclosure rather than to expressly prohibit the Commission from obtaining this information pursuant to DIVCA. Nowhere does AT&T provide a reference to Legislative History such as a bill analysis stating that the Legislature intended to constrain the Commission's ability to obtain information to the specific reports enumerated in DIVCA. For these reasons, AT&T's argument concerning Legislative History of DIVCA should be accorded little or no weight.

---

[4] See DIVCA § 5890(e) (3) and (4) that provide for the Commission to determine when 30% of the households with video service access have actually ***subscribed*** for six consecutive months.

[5] AT&T Application for Rehearing at p. 3.

[6] Section 5840(n)(2) of AB2987 as amended in the Senate August 23, 2006, p.15, reads:

> *(2) These reports shall be filed with the Legislature, the commission, the Governor, and the Attorney General, and posted on the holder's Internet Web site, no later than 30 days after the conclusion of each six-month reporting period.*

III. AT&T AND VERIZON'S APPLICATIONS FOR REHEARING ARE A COLLATERAL ATTACK ON DECISION 07-03-014

In an earlier phase of this proceeding, the Commission issued Decision 07-03-014, which discussed at length that the Commission would require broadband and video subscriber information by census tract.[7] In addition, the Commission determined that it has authority to require statewide video franchise holders to report additional information "if the production of new reports is truly necessary for the enforcement of specific DIVCA provisions under [the Commission's] regulatory authority."[8] Neither AT&T nor Verizon challenged these determinations through an application for rehearing and are now precluded from doing so.[9] Decision 07-03-014 is now final and non-appealable, at least with respect to the Commission's authority to require statewide video franchise holders to report additional information to the Commission. The instant Applications for Rehearing are effectively an impermissible collateral attack against Decision 07-03-014 by seeking to constrain any reporting requirement to those specific reports enumerated in the language of DIVCA itself.

IV. THE COMMISSION HAS AUTHORITY TO REQUIRE STATEWIDE FRANCHISE HOLDERS TO REPORT INFORMATION THAT IS NECESSARY TO THE COMMISSION'S ENFORCEMENT ROLE UNDER DIVCA

Under DIVCA, the Commission has authority to entertain complaints brought by local entities as well as institute proceedings against statewide video franchise holders to enforce non-discrimination and denial of access provisions of DIVCA.[10] In their Applications for Rehearing, both AT&T and Verizon argue that video subscriber

---

[7] Decision 07-03-014, Section XIII.B.3 at pp. 141-144.

[8] Id. Section XIII.B.5 at pp. 152.

[9] California Public Utilities Code Sections 1709, 1731 and 1757.1(c), describing the conclusiveness of CPUC orders and decisions in collateral proceedings; the time period for filing applications for rehearing of CPUC Decisions; and the directive that the findings and conclusions of the Commission shall be final and shall not be subject to review except as specified by the California Public Utilities Code.

[10] California Public Utilities Code § 5890 (g) and (h).

information by census tract is not necessary for the Commission to enforce the nondiscrimination requirements of DIVCA. DRA disagrees. First, in light of Decision 07-03-014, the determination of what information is necessary for the Commission to enforce DIVCA is the Commission's to make. Second, in this case, the Commission made that determination on the record and in a manner required by law. The record in this proceeding reveals that video subscriber information by census tract will offer insight into whether a statewide video franchise holder is complying with DIVCA requirements that the holder "may not discriminate against **or** deny access to service to any group of potential residential subscribers because of income of the residents in the local area in which the group resides."[11] Video subscriber information by census tract will allow the Commission to identify where a franchise holder has deployed its network and where there is low or high subscribership in that area. Perhaps more importantly, subscriber information is specifically referenced as a metric to determine whether a statewide video franchise holder is providing adequate video and broadband service to communities of diverse incomes under DIVCA.[12]

AT&T and Verizon's arguments that non-discrimination under DIVCA applies only to network access is not sustainable. A plain reading of the statutory language shows that AT&T and Verizon fail to address the fact that the statutory language is disjunctive and prohibits both discrimination and the denial of access. In addition, AT&T and Verizon's argument does not address the facts that discrimination against customers may occur in many forms.[13] Indeed, discrimination against potential low-income residential customers could occur as part of installation or network maintenance. While some of these issues may be subject to customer service standards under the jurisdiction of local entities, they may also in time fall within the scope of subsequent protections enacted by the Legislative as contemplated by California Public Utilities

[11] California Public Utilities Code § 5890(a). DRA comments dated May 31, 2007 at p. 4.

[12] *Id*. at § 5890(e)

[13] AT&T Application for Rehearing at p. 4; Verizon Application for Rehearing at pp. 6-9.

Code § 5900(a). Furthermore, evidence of discrimination may be probative of whether the Commission should impose a fine against a franchise holder or suspend or revoke a franchise under DIVCA.[14]

The Commission should dismiss the remainder of AT&T and Verizon's claims that video subscriber data constitutes trade secret information, is confidential or creates an undue reporting requirement. These are spurious arguments and in no way reflect the fact the Commission – as the statewide franchising authority – has violated the law by adopting Decision 07-10-014.

V. CONCLUSION

For the above reasons, DRA recommends that the Commission deny AT&T's and Verizon's Applications for Rehearing of Decision 07-10-013. The Commission should not change Finding of Fact 4 and Conclusion of Law 7 of Decision 07-10-013.

Respectfully submitted,

/s/ Helen M. Mickiewicz

Helen M. Mickiewicz
Attorney for the Division of Ratepayer Advocates

California Public Utilities Commission
505 Van Ness Ave., Room 4300
San Francisco, CA 94102
Phone: (415) 703-1319
Fax: (415) 703-4592
E-mail: hmm@cpuc.ca.gov

Dated: November 20, 2007

[14] California Public Utilities Code §§ 5890 (g) and (h).

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of **"RESPONSE OF THE DIVISION OF RATEPAYER ADVOCATES TO APPLICATIONS FOR REHEARING OF DECISION 07-10-013"** in **R. 06-10-005** by using the following service:

[X] **E-Mail Service:** sending the entire document as an attachment to an e-mail message to all known parties of record to this proceeding who provided electronic mail addresses.

[ ] **U.S. Mail Service:** mailing by first-class mail with postage prepaid to all known parties of record who did not provide electronic mail addresses.

Executed on November 20, 2007 at San Francisco, California.

s/s Imelda C. Eusebio
Imelda C. Eusebio

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address and/or e-mail address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

* *

Service List for R.06-10-005

william.weber@cbeyond.net
ann.johnson@verizon.com
drodriguez@strategicounsel.com
maggie.healy@redondo.org
citymanager@longbeach.gov
thause@ci.arcadia.ca.us
ckurtz@cityofpasadena.net
esther.northrup@cox.com
bnusbaum@turn.org
elaine.duncan@verizon.com
rcosta@turn.org
barry.fraser@sfgov.org
wlowery@millervaneaton.com
wlowery@millervaneaton.com
davidjmiller@att.com
fassil.t.fenikile@att.com
syreeta.gibbs@att.com
thomas.selhorst@att.com
enriqueg@lif.org
mschreiber@cwclaw.com
smalllecs@cwclaw.com
sbeatty@cwclaw.com
ahammond@scu.edu
lex@consumercal.org
anitataffrice@earthlink.net
douglas.garrett@cox.com
ijackson@oaklandcityattorney.org
lesla@calcable.org
mp@calcable.org
kenechukwuo@greenlining.org
markr@greenlining.org
pkamlarz@ci.berkeley.ca.us
robertg@greenlining.org
thaliag@greenlining.org
bill.hughes@sanjoseca.gov
g.gierczak@surewest.com
pwhitnell@cacities.org
mmalliet@cwa-union.org
ksaville@czn.com
gdiamond@covad.com
aloa.stevens@frontiercorp.com
LELDRID@ATTY.LACITY.ORG
chabran@cctpg.org
Roy.Morales@lacity.org
william.imperial@lacity.org
gfuentes@mminternet.com
Kramer@TelecomLawFirm.com
friedman@telecom-mgmt.com
andres.f.irlando@verizon.com
slastomirsky@sandiego.gov
swilson@riversideca.gov
cmailloux@turn.org
rcosta@turn.org
bnusbaum@turn.org
william.sanders@sfgov.org
malcolmy@asianlawcaucus.org
rdeutsch@sidley.com
gstepanicich@rwglaw.com
rhonda.j.johnson@att.com
info@tobiaslo.com
pcasciato@sbcglobal.net
whansell@cwclaw.com
jguzman@nossaman.com
katienelson@dwt.com
gxgw@pge.com
grant.kolling@cityofpaloalto.org
dhankin@wavebroadband.com
mark@ci.concord.ca.us
peter@ci.concord.ca.us
bobakr@greenlining.org
stephaniec@greenlining.org
smckown@marin.org
bmcc@mccarthylaw.com
holden@gosnc.com
cborn@czn.com
joe.chicoine@frontiercorp.com
kboyd@nossaman.com
rryan@saccounty.net
sue@buskegroup.com
ayo@cpuc.ca.gov
am4@cpuc.ca.gov
jjw@cpuc.ca.gov
lgx@cpuc.ca.gov
cho@cpuc.ca.gov
mmo@cpuc.ca.gov
leh@cpuc.ca.gov
sjy@cpuc.ca.gov
kot@cpuc.ca.gov
tjs@cpuc.ca.gov
wej@cpuc.ca.gov
dlh@cpuc.ca.gov
edward.randolph@asm.ca.gov
randy.chinn@sen.ca.gov